Supreme Court, U.S.
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No. 97-99

In The

Supreme Court of the United States

October Term, 1996

CENTEX BATESON CONSTRUCTION CO., INC.,

Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
of the State of New Mexico,

Respondent.

On Petition For Writ Of Certiorari
To The New Mexico Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the special Indian implied-preemption doctrine applies to determine the validity of New Mexico's gross receipts tax imposed on the receipts of a federal contractor from a federal agency for construction of a federal facility on an Indian reservation.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I THE DECISION BELOW FOLLOWS THIS COURT'S SUPREMACY-CLAUSE JURISPRUDENCE 2

A. Authority of a State to Tax a Federal Contractor Building a Federal Facility Has Long Been Settled Law Under the Intergovernmental Tax Immunity Doctrine ... 2

B. The Indian Implied-Preemption Doctrine Does Not Apply to Federal Contractors.. 3

II THERE IS NO CONFLICT AMONG FINAL STATE COURT DECISIONS ON THIS ISSUE... 6

III THE QUESTION PRESENTED HAS BEEN CORRECTLY RESOLVED BELOW..... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES:

United States Supreme Court Cases:

Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) 3

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 3, 4

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 3

Oklahoma Tax Commission v. Chickasaw Nation, 115 S.Ct. 2214 (1995) 6

Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943) 3

Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) 3, 5

Trotter v. Tennessee, 290 U.S. 354 (1933) 3

United States v. California, 507 U.S. 746 (1993) 2

United States v. New Mexico, 455 U.S. 720 (1982) 2, 8

United States Trust Co. v. Helvering, 307 U.S. 57 (1939) 3

Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) 3

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 4

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 3, 4, 5

TABLE OF AUTHORITIES – Continued

Page(s)

OTHER CASES:

Blaze Construction Company, Inc. v. Taxation and Revenue Dept, 117 N.M. 362, 871 P.2d 1368 (Ct. App. 1993), *reversed*, 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied*, 115 S.Ct. 1359 (1995) 6, 7

McNabb v. Bowen, 829 F.2d 787 (9th Cir. 1987) 7

State of Arizona ex rel. Arizona Department of Revenue v. Blaze Construction Company, 242 Ariz. Adv. Rep. 3, 1997 WL 205799 (Ct. App. 1997) 6

STATUTES:

25 U.S.C. § 450 5

25 U.S.C. § 1680c 1

N.M. Stat. Ann. §§ 27-5-1 *et seq.* (1995 Repl. Pamp.) 8

BRIEF IN OPPOSITION

The Taxation and Revenue Department of the State of New Mexico (Department or State) respectfully requests this Court to deny the Petition for a Writ of Certiorari filed by Centex Bateson Construction Co., Inc. (Centex).

STATEMENT OF THE CASE

Centex's statement of the case is accurate in all respects except two. First, New Mexico's assessment of tax hardly came as a surprise either to Centex or to the federal government. From the beginning of the project, counsel from the Department of Health and Human Services had discussed with the State the State's position that gross receipts tax would be owed on the contractor's receipts. Those discussions led to a contract provision specifying that the federal government would reimburse Centex for the full cost of the tax when appropriate. The hospital was fully completed as planned without reduction for tax payment. The federal government will bear the entire burden of the tax.

Second, the hospital constructed by Centex, although primarily for tribal members, is not exclusively limited to their use. Congress has mandated that the hospital must serve non-Indians in a number of circumstances. 25 U.S.C. § 1680c.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FOLLOWS THIS COURT'S SUPREMACY-CLAUSE JURISPRUDENCE

A. Authority of a State to Tax a Federal Contractor Building a Federal Facility Has Long Been Settled Law Under the Intergovernmental Tax Immunity Doctrine.

New Mexico's authority for taxing a federal contractor's receipts from performing construction services for an agency of the federal government rests on thoroughly settled law and does not merit reconsideration here. This Court has repeatedly affirmed the authority of states to tax federal contractors under the modern intergovernmental tax immunity doctrine. *United States v. California*, 507 U.S. 746 (1993); *United States v. New Mexico*, 455 U.S. 720 (1982).

Beyond question, New Mexico could tax a federal contractor's receipts from building a U.S. veteran's hospital in Albuquerque, New Mexico. There is no reason to treat any differently Centex's receipts from the construction of this federal Indian Health Service hospital in Shiprock, New Mexico, on the Navajo Reservation. Both hospitals fulfill essential obligations of the federal government for equally deserving constituencies. Certainly, it is not the gravity of the federal obligation that acts to preempt the state tax. Strengthening our nuclear deterrence, at issue in *United States v. New Mexico*, can surely brook no higher priority.

B. The Indian Implied-Preemption Doctrine Does Not Apply to Federal Contractors.

Because of the importance of tax collection to the very existence of state government, this Court has found preemption of state taxes only when Congress has expressly stated its intention to preempt. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933).

The only exception to explicit preemption of state tax is the special Indian implied-preemption doctrine upon which Centex relies. But the Indian preemption analysis has been employed exclusively when the taxpayer is a tribal member or a non-Indian taxpayer is dealing with a tribe or a tribal member.[1] The doctrine has never been extended to non-Indian taxpayers contracting with the federal government.

The Court's early formulation of the doctrine in *McClanahan* explained why it is limited only to tribes and tribal contractors. What distinguishes Indian preemption

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[1] *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965) (tax on trading post's sales to tribal members); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (income tax on tribal member on reservation-source income); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (motor carrier and fuel use tax on tribal timber contractor); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (tax on sale of farm machinery to tribe); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (tax on contractor's receipts from tribal school board for building tribal school); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (tax on tribal oil and gas lessee).

from normal preemption is that Indian sovereignty is brought into play: "it provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. The Court in *Bracker* confirmed tribal sovereignty as key: "The unique origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." 448 U.S. at 143. In *Cotton*, the Court explicitly described this unique form of implied-preemption in terms of *tribal* contractors: "for private parties doing business with Indian tribes, federal pre-emption is not limited to cases in which Congress has expressly – as compared to impliedly – preempted the state activity." 490 U.S. at 176-177. That the tribes may have acted in these cases with federal approval or federal money does not alter the fact that it was the tribes who were acting and whose sovereign interests needed to be weighed.

The fundamental constitutional relationship between the federal government, tribes, and states explains why Indian implied-preemption is limited to tribal contractors. When the federal government opts to have a federal contractor perform a service for it, Congress has authority under the Supremacy Clause to preempt state tax on that contractor whenever necessary to protect some vital federal interest. When a tribe contracts with a private entity to perform a service, however, the tribe itself does not have the authority to preempt state tax, no matter how vital those services might be to the tribe. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980). The Indian implied-preemption doctrine, therefore, incorporates a unique sensitivity to tribal

undertakings and "has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. No such judicial balancing-of-interests test is needed for federal contractors. Congress could have preempted the state tax here if it believed it necessary, but Congress chose not to.

The contract here is between Centex and the federal government. The tribe may be the beneficiary of this federal project, just as other groups benefit from other federal projects, but neither tribal action nor tribal sovereignty is implicated. This distinction is highlighted by the fact that the tribe could have invoked its sovereignty under the Indian Self-Determination Act, 25 U.S.C. § 450, by taking over responsibility for building this hospital. Had it done so, the contractor would have been dealing with the tribe and the Indian preemption analysis would have applied to weigh the tribe's interest. *Cf Ramah*. But instead, the tribe chose to leave to the federal government the responsibility for providing this health care service. As a result, the tribe's sovereignty is not at issue.

Contrary to Centex's claim, the decision below is fully consistent with all Supremacy Clause decisions of this Court, both those concerning intergovernmental tax immunity and those creating Indian preemption. The decision follows the black letter of these Indian preemption decisions by limiting the doctrine to cases where the taxpayer is dealing with a tribe. It also follows the spirit and intent motivating the doctrine which is to provide a heightened weighing of tribal interests in interpreting federal law when a tribe asserts its sovereignty. The tribe

chose not to assert its sovereignty here. This remained a federal project. The decision below was correct and review by this Court is unnecessary.

II. THERE IS NO CONFLICT AMONG FINAL STATE COURT DECISIONS ON THIS ISSUE

Centex alleges a "preliminary" conflict between the decision below and a recent Arizona Court of Appeals decision concerning the Blaze Construction Company.[2] As yet, the decision of this intermediate Arizona court is not final. Indeed, it may not be the last word in the Arizona *Blaze* litigation any more than the intermediate appellate court decision was in the New Mexico *Blaze* litigation.[3] The New Mexico Supreme Court correctly reversed that lower court decision. Its analysis was consistent with the most recent precedents of this Court recognizing that the Indian preemption analysis is limited to activity within Indian Country involving tribes or tribal members. *See Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995).

There is no conflict between final state court decisions that would justify review by the Court at this time.

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[2] *State of Arizona ex rel. Arizona Department of Revenue v. Blaze Construction Company*, 242 Ariz. Adv. Rep. 3, 1997 WL 205799 (Ct. App. 1997). Petition for review is pending in the Arizona Supreme Court.

[3] *Blaze Construction Company, Inc. v. Taxation and Revenue Department*, 117 N.M. 362, 871 P.2d 1368 (Ct. App. 1993), *reversed*, 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied*, 115 S.Ct. 1359 (1995).

III. THE QUESTION PRESENTED HAS BEEN CORRECTLY RESOLVED BELOW

Two years ago in the New Mexico *Blaze* litigation, Blaze's petition for certiorari presented this Court with the exact same issue that Centex now resubmits. The Court found no reason to grant certiorari then. 115 S.Ct. 1359 (1995). Nothing has changed within the last two years to warrant the Court's reconsideration now. The issue is important, certainly, but it was resolved correctly below.

Throughout this litigation, Centex has repeatedly obscured the distinction between the threshold question of whether the Indian preemption doctrine applies and the actual application of the doctrine itself. Again in its petition, Centex cites purportedly comprehensive federal legislation detailing the provision of health care services to the Indians as a reason to strike down the state tax. But "comprehensive federal regulation" would be germane only if one were using preemption *by implication*, the hallmark of Indian preemption. Because Centex has contracted with the federal government and not a tribe, express preemption is the standard. It is simply irrelevant how New Mexico's tax might have fared under an implied-preemption analysis. There was no reason for the Department's Hearing Officer to explore the relative burdens on state, federal, and tribal interests.

Nonetheless, even looking down that road, the burden of providing health care services to Indians does not rest exclusively with the federal government. Federal courts have recognized the state's obligation to share that responsibility. *See McNabb v. Bowen*, 829 F.2d 787, 794-795

(9th Cir. 1987) ("Congress did not intend that the federal government be exclusively responsible for Indian health care. It contemplated that the IHS would aid Indians in taking advantage of state and local programs, with the federal government meeting health care needs not met under those programs.") The State of New Mexico and San Juan County have the obligation to provide medical care to all indigent residents of the county, including indigent Navajos living on the reservation. N.M. Stat. Ann. §§ 27-5-1 *et seq.* (1995 Repl. Pamp.). The gross receipts tax assessed against Centex on its receipts from constructing this hospital will be distributed to the state and county and used partially to fulfill these responsibilities. Under these circumstances, even an implied-preemption analysis would likely lead to the same result.

One thing is undisputed about this federal legislation providing for Indian health care – it does not purport to preempt state tax imposed on federal contractors hired by the federal government to furnish those services. Absent such express preemption, the intergovernmental tax immunity doctrine of *United States v. New Mexico* supports New Mexico's tax assessment on Centex.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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